No. 89-1173

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAUL LUSKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government demonstrated, by a preponderance of the evidence, that petitioner participated in a conspiracy so that the out-of-court declaration of one of the co-conspirators could be admitted under Fed. R. Evid. 801(d)(2)(E).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-15a) is unpublished, but the decision is noted at 885 F.2d 867 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1989. A petition for rehearing was denied on October 19, 1989 (Pet. App. 2a). On December 11, 1989, the Chief Justice extended the time

to file a petition for a writ of certiorari to and including January 17, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of using interstate facilities in the commission of murder for hire and conspiring to do so, in violation of 18 U.S.C. 1952A (Supp. V 1987) and 18 U.S.C. 371; carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and possession of an unregistered firearm, in violation of 26 U.S.C. 5845(a)(7), 5861(d), and 5871. Pet. 2-3.[1] The district court sentenced petitioner to 35 years' imprisonment. Gov't C.A. Br. 4. The court of appeals affirmed. Pet. App. 3a-15a.

1. The evidence at trial showed that in 1986 and 1987 petitioner was involved in a bitter divorce proceeding with his wife Marie. Petitioner decided to have his wife killed rather than going forward with the divorce and risking the loss of the bulk of his assets, especially his share in a successful chain of electronics stores. For a fee of $50,000, he hired James Liberto to arrange the murder. James Liberto, in turn, commissioned Milton "Sonny" Cohen to kill Marie Luskin. Joseph Liberto, the brother of James Liberto and a long-time employee of petitioner, provided information about Mrs. Luskin's whereabouts in

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[1] Co-defendants James Liberto, Joseph Liberto, and Milton "Sonny" Cohen were convicted of the same offenses. James Liberto and Cohen were also convicted of illegal possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(1)(B) (1982 & Supp. V 1987). Pet. 2-3.

Florida to the conspirators. Pet. App. 6a; Gov't C.A. Br. 7.

On March 9, 1987, Cohen gained entry to Marie Luskin's Florida home by posing as a deliveryman for a florist shop. He then shot Mrs. Luskin in the head. Remarkably, she survived the attack. Following the March 9 murder attempt, petitioner had a conversation with Mrs. Luskin in which he demanded that she settle the divorce case. In the course of the conversation, petitioner told her, "I'm warning you Marie, remember that there are always other florists * * *." Gov't C.A. Br. 37.

Cohen feared that Mrs. Luskin had seen his face during the unsuccessful murder attempt, so he recruited James Manley to help him make a second attempt on her life. In May 1987, the two men traveled to Florida together to kill Mrs. Luskin, but they failed to carry out their plan. Pet. App. 6a; Gov't C.A. Br. 7.

Cohen subsequently told Manley that because further divorce proceedings were imminent, there would be a $25,000 bonus if Mrs. Luskin was killed on July 28, 1987, at a dinner meeting scheduled at a restaurant in Hollywood, Florida. Susan Davis, petitioner's girlfriend, had received an invitation to the dinner and had told petitioner about it. Pet. App. 6a; Gov't C.A. Br. 7-8.

On July 27, 1987, Manley and Cohen again traveled to Florida to kill Mrs. Luskin. They planned to use an AR-15 rifle that James Liberto had given to Cohen. Manley and Cohen positioned themselves in the parking lot of the restaurant the following evening, but were unable to get a clean shot at their intended victim. Pet. App. 6a; Gov't C.A. Br. 8.

A day or two later, Amtrak security officials in Florida observed that Manley and Cohen matched a

drug courier profile and alerted authorities in Baltimore. Upon their arrival in Baltimore on July 30, 1987, Manley and Cohen were stopped by law enforcement officers and asked to produce identification. When Manley could not do so, the officers escorted the two men to an interview room where dogs trained in narcotics detection reacted positively to their luggage. The officers obtained a search warrant and found the loaded AR-15 rifle and a laser scope in Manley's luggage. Cohen's bag contained two loaded pistols, a silencer, and 3.5 ounces of cocaine. Both men were arrested. Pet. App. 5a-6a.

As part of a plea arrangement, Manley agreed to testify at petitioner's trial. Gov't C.A. Br. 6. Manley described the conspiracy to kill Marie Luskin, including details Cohen had communicated to him. *Id.* at 32. Manley's testimony was corroborated by statements of other witnesses and by physical evidence. Pet. App. 6a; Gov't C.A. Br. 32-33 & n.21.

2. The court of appeals affirmed petitioner's conviction, rejecting his claim that Manley's testimony was improperly admitted under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Applying this Court's holding in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), the court found that the government had laid a proper foundation for the admission of Cohen's statements through Manley's testimony, by "introduc[ing] a plethora of evidence to show both that a conspiracy existed and that [petitioner] was an active participant in it." Pet. App. 12a. Accordingly, the court concluded that the district court had properly admitted Cohen's statements about petitioner's role in the murder scheme. *Id.* at 13a.

ARGUMENT

1. Petitioner renews his contention that the district court improperly admitted statements that Cohen made to Manley about the murder-for-hire scheme. Petitioner claims that the government failed to establish a predicate for the admission of that evidence—the existence of a conspiracy and proof of petitioner's participation in it.

In *Bourjaily* v. *United States*, 483 U.S. 171, 175-176 (1987), this Court held that under Rule 801(d)(2)(E) a trial court may admit hearsay statements made by a co-conspirator if the government can demonstrate, by a preponderance of the evidence, that a conspiracy existed and that the defendant participated in it. In addition, the Court concluded that a trial court making that determination may consider all relevant evidence, including the co-conspirator statements themselves. 483 U.S. at 178. The Court explained that "a co-conspirator's statements could * * * be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy." *Id.* at 180.

In the present case the government produced substantial evidence to establish that there was a conspiracy to murder Marie Luskin and that petitioner was a party to that conspiracy. Manley's testimony described the operation of the conspiracy in great detail. He said that he had learned from Cohen that petitioner had organized the plan to kill his wife in order to terminate their costly divorce proceeding. Cohen's account of the March 9 murder attempt, as related by Manley, was corroborated by the testimony of Mrs. Luskin and her housekeeper, and by forensic evidence. Gov't C.A. Br. 33-34 & n.23.

Quite apart from Manley's testimony, independent evidence implicated petitioner in the murder scheme. Following the attempted murder on March 9 by a person posing as a floral deliveryman, petitioner told Marie Luskin that "there are always other florists." Gov't C.A. Br. 37. That remark constituted a clear threat that there would be further attempts on her life.

The evidence demonstrated that petitioner had a strong motive for organizing the conspiracy. His divorce was a protracted and bitter dispute that had the potential to deprive petitioner of significant assets, particularly his share in a chain of successful South Florida electronics stores. Petitioner was extremely upset about his wife's decision to seek a divorce. After he was served with divorce papers, petitioner went on a rampage and caused substantial damage to the family home. In addition, Mrs. Luskin's attorney filed repeated contempt motions against petitioner for his failure to pay alimony and child support. As a result, petitioner was arrested and incarcerated on several occasions. Gov't C.A. Br. 33.

Furthermore, the government introduced various pieces of circumstantial evidence that confirmed petitioner's participation in the conspiracy. First, telephone toll records from March 9, 1987, showed that one hour after the attempt on Mrs. Luskin's life, Cohen called James Liberto's restaurant from a Hollywood, Florida, hotel. Immediately thereafter, James Liberto called his brother, Joseph, first at his Florida home, and then at the store where he worked. Later that day, a call was made from petitioner's car phone to the same store. Petitioner then called his home, where Marie Luskin's aunt told him that everything was fine. Petitioner immediately called the store

again. Gov't C.A. Br. 37 n.29.[2] From that pattern of telephone calls it was reasonable to infer that petitioner knew about the plot to kill his wife on March 9, received the information that a murder attempt had taken place, and made inquiries to determine if that attempt was successful.

Finally, the testimony of Susan Davis provided a significant link between petitioner and the plot to kill Marie Luskin. Davis stated that she was a member of the "single parents" group to which Mrs. Luskin belonged, and that she usually attended the group's meetings. She also testified that the group was scheduled to have a dinner meeting on July 28 and that she had informed petitioner about that meeting. Gov't C.A. Br. 35-36. The reasonable inference from that evidence is that James Liberto obtained the information about the meeting from petitioner and communicated it to Cohen, who, in turn, made plans to kill Mrs. Luskin at the restaurant.

In light of all this evidence, the district court was correct in concluding that a conspiracy existed and that petitioner was part of it. Accordingly, Cohen's co-conspirator declarations were properly admitted into evidence under Fed. R. Evid. 801(d)(2)(E).

2. Contrary to petitioner's contention, the decision below does not conflict with *United States* v. *Silverman*, 861 F.2d 571 (9th Cir. 1988). In *Silverman*, the Ninth Circuit held that the evidence used to support the admission of co-conspirator declarations must

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[2] As petitioner notes (Pet. 7), the court of appeals appears to have misunderstood the record with respect to two of the March 9 phone calls. Compare Gov't C.A. Br. 37 n.29 with Pet. App. 12a-13a. The actual sequence of calls, however, is equally indicative of petitioner's membership in the conspiracy.

be "fairly incriminating" in nature. 861 F.2d at 578. The court also noted that "wholly innocuous conduct or statements by the defendant" would rarely be sufficiently corroborative to prove that a defendant knew of and participated in a conspiracy. *Ibid.* While we disagree with the suggestion in *Silverman* that only "fairly incriminating" evidence can provide a foundation for the admission of co-conspirator declarations, the evidence at petitioner's trial would have satisfied even that standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1990

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